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In The

Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE, L.L.C.,

Petitioners,

v.

MARK TREESH, COMMISSIONER FOR THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

DOUGLAS M. DOWELL, SR.
Counsel of Record
LAURA M. FERGUSON
BETHANY ATKINS RICE
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
501 High Street
P.O. Box 423
Frankfort, Kentucky 40602-0423
(502) 564-3112

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

A tax law enacted by Kentucky in 2005 now imposes gross revenue and excise taxes upon multichannel video programming service provided by or purchased from, *inter alia*, cable television service providers and satellite television service providers. The service is taxed at the same rate, regardless of the origin or location of the provider, the origin or situs of the service, or the amount of business done by the provider in or outside Kentucky. Kentucky's law also prohibits local taxing jurisdictions from imposing franchise or license taxes or fees upon this service and allows a credit against the gross revenue and excise taxes if these taxes or fees are levied in the face of this prohibition. This prohibition or credit protects all providers, regardless of the origin or location of the provider, the origin or situs of the service, or the amount of business done in or outside Kentucky. There is no constitutional or other legal requirement that these franchise or license fees or taxes be imposed. Cable television service providers were potentially subject to franchise or license taxes or fees under Kentucky law; § 602 of the Telecommunications Act of 1996 exempts satellite television service providers from such taxes or fees, but it does allow local jurisdictions or political subdivisions to receive revenue produced by a tax like Kentucky's.

The question presented is whether Kentucky's law in its practical operation discriminates against interstate commerce in violation of the dormant Commerce Clause.

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STATEMENT

1. In 2005, the Kentucky General Assembly enacted new excise and gross revenue taxes, effective January 1, 2006. 2005 Ky. Acts, ch. 168, §§ 90, 96, 168. These excise and gross revenues taxes are part of a "tax and distribution system" that the General Assembly found:

> (1) Addresses an important state interest in providing a fair, efficient and uniform method for taxing communications services sold in this Commonwealth;
>
> (2) Overcomes limitations placed upon the taxation of communications service by federal legislation that has resulted in inequities and unfairness among providers and consumers of similar services in the Commonwealth;
>
> (3) Simplifies an existing system that includes a myriad of levies, fees and rates imposed at all levels of government making it easier for communications providers to understand and comply with the provisions of the law;
>
> (4) Provides enough flexibility to address future changes brought about by industry deregulation, convergence of service offerings, and continued technological advances in communications; and
>
> (5) Enhances administrative efficiency for communications service providers, the

> state, and local governments by drastically reducing the number of returns that must be filed and processed on an annual basis.

Ky. Rev. Stat. Ann. ("KRS") § 136.600.

The excise tax is "imposed on the retail purchase of multichannel video programming service provided to a person whose place of primary use is in this state" at a rate of 3% "of the sales price charged." KRS § 136.604(1) and (2). The gross revenues tax is imposed on the gross revenues realized from the provision of multichannel video programming service in Kentucky. KRS §§ 136.616(1) and 136.602(12). The tax rate is 2.4% of the gross revenues. KRS § 136.616(2)(a). The term "multichannel video programming service" as used in these statutory provisions "means cable service and satellite broadcast and wireless cable service." KRS § 136.602(1), (8) and (18).

Nowhere in the 2005 legislation is any difference in treatment accorded cable service and satellite broadcast and wireless cable service based upon the location of the provider or the origin or situs of the service. Moreover, the statutory definitions of "gross revenues" and "sale price," which comprise the base of the taxes in question, make no distinction between cable service providers and satellite broadcast and wireless cable service providers, nor do they make any differentiation based upon the location of the

provider or the origin or situs of the service. KRS §§ 136.614; 136.616; 136.602(6), (12) and (17).

As KRS § 136.600 reflects, the 2005 legislation establishes a system for the distribution of the revenues generated by the excise and gross revenues taxes. KRS §§ 136.648 to 136.660. Specifically, the revenues from these taxes are to be deposited in a gross revenues and excise tax fund and allocated "among the state, political subdivisions, school districts and special districts" in accordance with the provisions of the 2005 legislation. KRS § 136.648(3).

To effectuate the purposes of this tax distribution system and this legislation generally, KRS § 136.660(1) prohibits Kentucky political subdivisions from levying, enforcing, or requiring the payment of any franchise fee or tax on multichannel video programming service. "Franchise fee or tax" is defined as:

> (a) Any tax, charge, or fee, that is required by ordinance or agreement to be paid to a political subdivision by or through a provider, in its capacity as a provider, regardless of whether the tax, charge, or fee, is:
>
> 1. Designated as a franchise fee, sales tax, excise tax, user fee, occupancy fee, subscriber charge, license fee, or otherwise;
>
> 2. Measured by the amounts charged for services, the type or amount of

equipment or facilities deployed, or otherwise;

3. Intended as compensation for the use of public or private rights-of-way, the right to conduct business, or otherwise; or

4. Permitted or required to be separately stated on the purchaser's bill; or

(b) Any in-kind payment of property or services that is required to be furnished by a provider by any ordinance that is enacted or agreement that is entered into after January 1, 2006.

KRS § 136.660(2). Any political subdivision imposing or attempting to impose a franchise fee or tax in violation of this prohibition cannot share in the proceeds of the excise and gross revenues taxes. KRS § 136.660(4). Moreover, providers receive credit against their excise and gross revenue tax liabilities for any franchise fees or taxes they actually pay, up to the total tax due for the provision or purchase of the multichannel video programming service within the political subdivision exacting the franchise fee or tax. KRS § 136.660(5).

2. For the source of the subsidy of their impermissible tax and subsidy theory, the Petitioners focus exclusively upon franchise fees cable television providers *may* be subject to when utilizing public ways and streets. *See, e.g., City of Florence v. Owen Elec.*

Cooperative, Inc., 832 S.W.2d 876, 879 (Ky. 1992). Such "[a] franchise inheres in the sovereignty of the state." *Id.* There is no requirement that such a franchise be awarded or that it be awarded to the highest and best bidder. Ky. Const. § 164 ("Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefore publicly, and award the same to the highest and best bidder, but it shall have the right to reject any or all bids."). The Kentucky courts have also held that a person engaged in an activity otherwise subject to the franchise provisions of Kentucky law, but who had not obtained such a franchise, could be subjected to a license tax that is described below. *Hardin County Kentucky Telephone Co. v. City of Elizabethtown*, 227 Ky. 778, 14 S.W.2d 162 (1929); *Cumberland Telephone & Telegraph Co. v. City of Calhoun*, 151 Ky. 241, 151 S.W. 659 (1912).

The Petitioners suggest that federal law requires or causes local governments to charge franchise fees that are 5% of the cable television provider's gross revenues. Pet. at 4. In reality, the law states a "cable operator *may* be required under the terms of any franchise to pay a franchise fee" and that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system *shall not exceed* 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services." 47 U.S.C. § 542(a) and (b) (emphasis added). Thus, there is no federal requirement that these fees be imposed. *See,*

e.g., Chicago v. Comcast Cable Holdings, L.L.C., 384 F.3d 901, 905 (7th Cir. 2004) (holding that "Section 542(a) does not purport to override state law, let alone to deny states all power in the field" and that "[s]o if, for example, Illinois law capped fees at 3%, Chicago could not rely on § 542(a) to charge 5%.").

As indicated above, Kentucky law allows the imposition and collection by "counties, towns, cities and other municipal corporations" of license fees or taxes "on franchises, trades, occupations and professions." Ky. Const. § 181. These licenses fees or taxes can be required of a variety of businesses for the right to exercise the privilege of doing business in that jurisdiction and those license taxes may be based upon the net profits or gross receipts of the taxed persons or entities. *See, e.g., Patrick v. City of Frankfort*, 539 S.W.2d 275 (Ky. 1976); *City of Louisville v. Sebree*, 308 Ky. 420, 214 S.W.2d 248 (1948); *Paducah Automotive Trades Ass'n v. City of Paducah*, 307 Ky. 524, 211 S.W.2d 660 (1948); *City of Louisville v. Sagalowski*, 136 Ky. 324, 124 S.W. 339 (1910).

Thus, the imposition of the franchise fees the Petitioners claim were the expense "subsidized" by Kentucky's new 2005 law was not inevitable or required by law. Moreover, the Petitioners were themselves subject to essentially the same type of exaction under Kentucky law – i.e., license fees or taxes – if they engaged in business in any of the various Kentucky local jurisdictions.

The Petitioners were not subject to these license fees or taxes, however, by virtue of the Telecommunications Act of 1996, which provides:

> (a) PREEMPTION – A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.
>
> * * *
>
> (b) Definitions, For the purposes of this section
>
> * * *
>
> (3) LOCAL TAXING JURISDICTION – The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.
>
> * * *
>
> (5) TAX OR FEE – The terms 'tax' and 'fee' mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating or raising revenue for a local taxing jurisdiction.
>
> * * *

> (c) PRESERVATION OF STATE AUTHORITY – The section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

Pub. L. No. 104-104, Title VI, § 602(a), 110 Stat. 144(a) (1996) (reprinted in 47 U.S.C. § 152, historical and statutory notes).

3. The Petitioners' suit challenged Ky. Rev. Stat. Ann. § 136.660(4) and (5) (or § 118 of the 2005 legislation) and sought a permanent injunction against the enforcement of these provisions. Compl. ¶ 1. They asserted that these statutory provisions had "the practical effect of discriminating against interstate commerce" because "cable system operators" paid franchise fees and satellite television providers did not, rendering these provisions "nothing but an illusory benefit to satellite providers." Compl. ¶¶ 26, 33-34.

The Petitioners' complaint stated that they then "currently provide[d] service to approximately 450,000 subscribers in Kentucky." Compl. ¶ 8. They also admitted to having sales employees located in Kentucky. Compl. ¶ 17. In addition, the Petitioners acknowledged that their "subscribers received the signal directly from satellites by means of a small, pizza-sized dish mounted on or near their house[s]" and that "[t]he signal is then transmitted to a receiver/decoder

system (a 'set-top box') connected to the television." Compl. ¶ 15.

The district court granted the Respondent's motion to dismiss for failure to state a claim upon which relief could be granted. Pet. App. at 21a, 55a. The court held that the "statutory burden imposed on the [Petitioners] has nothing to do with their residence or the location of their economic activities." Pet. App. at 40a. The court further stated that the dormant Commerce Clause "does not protect 'the particular structure or methods of operation in a retail market'" or "'particular interstate firms' operating in an interstate market." Pet. App. at 42a (quoting *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 127 (1978)). The court also noted that "[t]here was not even an allegation that Kentucky's new tax would have the effect of encouraging any economic activity in Kentucky or discouraging that same activity elsewhere." Pet. App. at 53a. Instead, "the statute would inflict the same burden on an in-state satellite company as on an out-of-state satellite company and the same benefit on an out-of-state cable company as an in-state cable company." Pet. App. at 53a.

The Sixth Circuit unanimously affirmed the district court's decision. Pet. App. at 1a-20a. The court held that Kentucky's law had not "altered any competitive balance among in and out-of-state competitors." Pet. App. at 17a. The court noted in support of its decision that the object of the Commerce Clause was "to protect interstate commerce, and not particular firms engaged in interstate commerce, or the

mode of operation used by those firms." Pet. App. at 18a-19a.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. When this case is viewed for what it is truly about, there are no special and important reasons warranting further review.

1. The focus of the facet of the dormant Commerce Clause invoked by the Petitioners is "discriminat[ion] against interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-78, 287 (1977). "A state may not 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1957)). "[A] state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). *See also Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332, n. 12, 336-37 (1977) (stating that "[a] tax may not discriminate on the basis of some interstate element" and that "[w]e hold only that in the process of competition no State may *discriminatorily* tax the products manufactured or the business operations performed

in any other State" (emphasis added)). "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Kentucky's law does not discriminate in any manner against interstate commerce. The excise and gross revenue taxes in question are imposed upon, or required to be collected by, all purchases of, or providers rendering, multichannel video programming service in Kentucky. KRS §§ 136.604; 136.616; 136.602(8), (10) and (12). No distinction of any kind is made between in-state providers and out-of-state providers or the origins of the video programming sold or provided.

The Petitioners alleged below that they "currently provide service to approximately 450,000 subscribers in Kentucky." Compl. ¶ 8. Let us assume that a new satellite company was incorporated in Kentucky and promptly commenced competition with the Petitioners, luring away half of their 450,000 subscribers. Let us further assume that the new company's headquarters and all of its facilities and employees were located or operated in Kentucky. Under this example, there would be no difference whatsoever in the treatment afforded this new Kentucky satellite television provider under the excise and revenue tax law from that accorded the Petitioners.

The Kentucky law therefore does not discriminate against interstate commerce. "When the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). Kentucky's law taxes the provision or purchase of multichannel video programming service in an evenhanded manner, regardless of the origin of the service or its provider.

Unlike other laws that have been held to offend the dormant Commerce Clause, Kentucky's law does not encourage economic activity in Kentucky or discourage the same activity in another state. Nor does it encourage consumers to deal with in-state companies at the expense of out-of-state companies. *Compare Fulton Corp. v. Faulkner*, 516 U.S. 325, 333-34 (1996); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271-73 (1984); *Boston Stock Exchange*, 429 U.S. at 607-08. Instead, Kentucky's law does not discriminate on the basis of geographic location or "exert a pressure on an interstate business to conduct more of its activities in" the state, but provides for taxation in a uniform manner that does not discriminate against interstate commerce. *Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Dept. of the Treasury*, 490 U.S. 66, 77-78 (1989). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1980) (holding that a Minnesota law did "not effect 'simple protectionism' [in violation of the Commerce Clause], but 'regulate[d] evenhandedly' by prohibiting all milk retailers from selling their

products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State."); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981) (holding that discrimination against interstate commerce was not present because the "tax burden [was] borne according to the amount consumed and not according to any distinction between in-state and out-of-state consumers."); *CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69, 87-88 (1987) ("Because nothing in the Indiana Act imposes a greater burden on out-of-state [tender] offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce."); *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 542 (1969) ("Nor is the tax invalid as a discrimination against interstate commerce [because] Alabama's tax is levied equally upon all transient or traveling photographers whether their travel is interstate or entirely within the State.").

Therefore, the decision below does not conflict with and, indeed, is entirely consistent with a number of this Court's past precedents. No further review is necessary and there is certainly no compelling reason for this Court's review, as the decision below is supported by settled principles as established by numerous decisions of this Court.

2. The Petitioners rely heavily upon what they portray as the threatened demise of *West Lynn Creamery* presented by this case. Pet. at 2-3. Their

argument overlooks the important point made in this Court's dormant Commerce Clause jurisprudence that "the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange*, 429 U.S. at 329. This case is markedly different from *West Lynn Creamery*.

The Court in *West Lynn Creamery* found the milk pricing order at issue to be in effect a "protective tariff or customs duty, which taxes goods imported from other states, but does not tax similar products produced in State." 512 U.S. at 193. This type of exaction, the Court noted, was "[t]he paradigmatic example of a law discriminating against interstate commerce." *Id.* The pricing order imposed an assessment upon all fluid milk sold by dealers to Massachusetts retailers. *Id.* at 188. The fund thereby created was distributed to Massachusetts milk producers. *Id.* at 190-91. This Court found this scheme to be "effectively a tax which makes milk produced out of State more expensive" and "[l]ike an ordinary tariff, the tax is thus effectively imposed only on out-of-state products." *Id.* at 195. This pricing order "thus [would] almost certainly 'cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market.'" *Id.* at 196. The Court accordingly held that "[t]his effect renders the [pricing order] program unconstitutional, because it, like a tariff, 'neutralizes advantages belonging to the place of origin.'" *Id.*

A linchpin of the Petitioners' case is that they are interstate and that cable television providers are local or intrastate. This contention was rightly rejected as fallacious by the courts below. Kentucky's law taxes the purchase or provision of all multichannel video programming service in Kentucky, without regard to the location of the provider or the origin or situs of the service. KRS §§ 136.614; 136.616; 136.602(6), (12) and (17). As the district court below determined, Kentucky's law "has the same effects on the Satellite Companies and the Cable Companies whether or not a particular company is a domiciliary or resident of Kentucky." Pet. App. at 41a.

Moreover, a decision of this Court establishes that cable television service is interstate and not simply local. In affirming the Federal Communications Commission's exercise of jurisdiction over such services, this Court stated:

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To

> categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.'

United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968).

Further, it was pointed out in the proceedings below "that the three largest cable companies in Kentucky are headquartered in states other than Kentucky." Pet. App. at 24a. The Petitioners have at no time disputed this. The district court also made the following determinations:

> In reality, however, the mechanisms by which both the Cable Companies and the Satellite Companies deliver programming lie partially outside of Kentucky and partially inside the state. In arguing that their transmission mechanisms lie totally outside of Kentucky, the Satellite Companies have arbitrarily considered only the location of their orbiting satellites. Even without considering whether the Satellite Companies utilize "local receive facilities" that are located in the state as the KCTA alleges, the Satellite Companies must concede that, in transmitting programming, they rely upon a multitude of receive dishes throughout the state.
>
> It is also false that Cable Companies utilize only transmission facilities located in the state. Again, in determining the location

> of the Cable Companies' delivery mechanisms, the Satellite Companies have arbitrarily looked only to the cable headend and the cables laid or strung in the state. Before the cable programming ever gets from the cable headend to the subscribers, however, it is transmitted to the headend by out-of-state satellites and microwave systems.

Pet. App. at 48a. Here again, the Petitioners have not and cannot dispute the foregoing.

It is therefore abundantly clear that cable television service providers are not simply intrastate, instate or local businesses or economic interests. Thus, the central premise of the Petitioners' case is fundamentally flawed.

As the courts below held, the Petitioners' real complaint is that by the nature of their means of delivery of multichannel video programming service, they are not receiving the same benefit as cable television service providers. As we shall see, this point is itself subject to some debate. Nevertheless, this complaint does not implicate the dormant Commerce Clause's prohibition of discrimination against interstate commerce. As this Court has held on a number of occasions, which the courts below followed in this case, Pet. App. at 16a-19a, 42a-50a, "the Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses, not from the location of their activities.'" *Kraft General Foods, Inc. v. Iowa Dept. of*

Revenue and Finance, 505 U.S. 71, 78 (1992) (quoting *Amerada Hess Corp.*, 490 U.S. at 78); *see also Commonwealth Edison Co.*, 453 U.S. at 617-19. The Commerce Clause "protects the interstate market," but it does not "protect[] the particular structure or methods of operation in a retail market." *Exxon Corp.*, 437 U.S. at 127-28.

The Petitioners' argument is squarely at odds with these settled principles. In their view, they will *always* be the out-of-state or interstate firm; everyone else will always be local or intrastate. As the courts below correctly held, their claim is really a plea for protection of their business or method of operation and not the interstate market.

Properly viewed, this case entailed the application of settled principles of law in a particular narrow context. Again, this case presents no compelling reasons for this Court's review.

3. The *West Lynn Creamery* case involved the creation of a fund from which subsidies were distributed to in-state dairy farmers. In this case, there are no subsidies being paid to in-state businesses. Instead, Kentucky is forbearing from the imposition of local taxes upon multichannel video programming service. Whether such taxes may or may not be imposed is a matter of state sovereignty, for the Commerce Clause "does not . . . eclipse the reserved 'power of the States to tax for the support of their own governments.'" *Boston Stock Exchange*, 429 U.S. at 328-29. Thus, Kentucky was not bound to adhere

to the system of taxation in place before the 2005 law, which is effectively what the Petitioners advocate.

As the Sixth Circuit aptly observed, "States and local government are under no mandate to charge for the use of local rights-of-way; this is readily apparent from the fact that not every road is a toll road." Pet. App. at 14a. As we have seen, there is no legal requirement that cable television service providers pay franchise fees to local governments. Likewise, there is no legal requirement that local governments impose license fees or taxes upon other persons doing business in their jurisdictions. The Commerce Clause does not demand that States structure their tax systems in any particular manner. Instead, its concern is with discrimination against interstate commerce. *Boston Stock Exchange*, 429 U.S. at 336-37.

In this case, Kentucky's law provides a nondiscriminatory prohibition against the imposition of local taxes on multichannel video programming services. This prohibition is not based upon the location of the provider or the origin or situs of the service. Kentucky political subdivisions are barred from levying these taxes or fees upon this service, regardless of its provider's location, the service's origin or situs or the amount of business done by that provider in Kentucky or elsewhere.

Moreover, the franchise fees covered by this prohibition are broadly defined. Not only does the statutory definition of the proscribed franchise fees include franchise fees in the narrow sense that the

Petitioners have focused upon, but it also embraces license fees or taxes that the Petitioners would be subject to under Kentucky law for engaging in business in the various local jurisdictions. KRS § 136.660(2); Ky. Const. § 181; *City of Louisville v. Sebree*, 214 S.W.2d at 251-52; *Paducah Automotive Trades Ass'n*, 211 S.W.2d at 661-62, 664-66. The Petitioners are, of course, exempt from these license fees or taxes by virtue of § 602 of the Telecommunications Act of 1996. But that does not make the protection of Kentucky's law any less real. At this point, that protection is perhaps redundant, but § 602 is not a binding promise and does not create any vested right for the Petitioners. *United States v. Carlton*, 512 U.S. 26, 33 (1994). Congress can repeal it at any time and then the reality of the benefit of Kentucky's law to the Petitioners would become manifest.

The existence of § 602 certainly would not make Kentucky's law discriminatory against interstate commerce. Instead, this discrimination must inhere in the law itself. This Court has stated that the appropriate inquiry is "whether *the statute under attack*, whatever its name may be, will in *its* practical operation work discrimination against interstate commerce," *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (emphasis added), and that "[a] state tax must be assessed in light of *its* actual effect considered *in conjunction with other provisions of the State's tax scheme*." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (emphasis added). As this Court stated in

Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277, n. 12 (1978):

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay tax on a greater portion of its income than a local Iowa company, and an Iowa company doing business in Illinois will pay tax on less of its income than an Illinois corporation doing business in Iowa. The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter.

(Emphasis by Court.) By the same token, Kentucky's law is not responsible for § 602 of the 1996 Telecommunications Act and cannot be in violation of the dormant Commerce Clause by virtue of that law.

If anything, § 602 represents Congressional consent to the manner of taxation Kentucky has adopted. *See Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) ("[I]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce

Clause challenge"). Under this federal law, Kentucky is specifically authorized to impose a tax upon direct-to-home satellite service and distribute the revenue so obtained to local jurisdictions and that is precisely what it has done by the 2005 law. Consequently, there can be no dormant Commerce Clause violation here. *Id.* The appropriate forum for the Petitioners' complaint that they are being subjected to unfair or burdensome state taxation is Congress, where they apparently have had some success in the past. Pet. at 20-21.

In the final analysis, the Petitioners' claim is not about discrimination against interstate commerce, but is instead about preserving an advantageous position they enjoyed under prior state law in tandem with federal law. As we have seen, however, it is settled that the Commerce Clause does not protect particular interstate businesses, yet that is precisely what the Petitioners advocate here. Their claim that the 2005 legislation provides them with only an "illusory benefit" is unfounded and is in reality a claim for the perpetuation of their historical tax advantage and not one for discrimination against interstate commerce.

4. The Petitioners have offered no compelling reasons for this Court's review. The Sixth Circuit's decision does not conflict with that of any other United States court of appeals or state court of last resort. The cases that Petitioners invoke in support of their assertion of such a conflict bear no resemblance to this case.

The Petitioners' criticism of the Court of Appeals for stating that "a purpose *might* have been to aid the cable industry rather than the satellite industry" does not establish a basis for further review. Again, as we have seen, the dormant Commerce Clause forbids discrimination against interstate commerce and does not protect particular interstate firms or methods of operation in an interstate commerce. Furthermore, the Petitioners did not allege below that Kentucky's law had a discriminatory purpose, Compl. ¶ 35, and this is reflected in their petition's statement of the QUESTION PRESENTED. Pet. at i. Moreover, they did not establish, nor did any court below find, the existence of any discriminatory purpose or motive.

None of the Petitioners' other arguments establish compelling reasons for this Court's review. The fact of the matter is that Kentucky has imposed a uniform, nondiscriminatory tax in the particular context of the taxation of multichannel video programming service. The Sixth Circuit decision is in accord with numerous past decisions of this Court. *See, e.g., Kraft General Foods*, 505 U.S. at 78; *Amerada Hess*, 490 U.S. at 75-79; *Exxon Corp.*, 437 U.S. at 125-28.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS M. DOWELL, SR.
Counsel of Record
LAURA M. FERGUSON
BETHANY ATKINS RICE
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY
501 High Street
P.O. Box 423
Frankfort, Kentucky 40602-0423
(502) 564-3112